CORPORATIONS AND EXPRESS TRUSTS AS BUSINESS ORGANIZATIONS.*

II.

Parties to Be Incorporated:

Coke's second requisite of corporate existence was parties to incorporate, and he indicated that these might be either natural or artificial. It seems now that the latter, i. e. corporations cannot, unless authorized expressly or by necessary implication be either an incorporator or member of another corporation.[141a] General incorporation laws contemplate incorporators and members. The former are persons, in the case of business corporations, whose function it is to bring the corporation into existence under the statute; they may or may not themselves become members by taking stock. When the corporation is organized, their functions, as incorporators, cease.[142] On the other hand the members are those who become such by ownership of stock, and in the beginning, this ownership is acquired through a subscription. If this is made after the corporation is created, and capable of contracting, the ordinary rules of contract may apply.[143]

In most cases, however, there can be no corporation until members are secured, and this must be either before or contemporaneously with the coming into existence of the corporation. This situation has puzzled the courts exceedingly. There are numerous views; (1) Such a preliminary agreement has no force and effect, unless it strictly conforms to the statute, as signing and acknowledging the incorporation paper;[144] (2) That it is a valid contract from the time the requisite amount is subscribed, from which a party cannot thereafter withdraw and which is enforceable against the estate of one who dies before the corporation comes into existence and accepts it;[145] (3) That such a preliminary subscription is a mere withdrawable offer, revocable by death or insanity, at any time before the corporation comes into existence and accepts it expressly or

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* Continued from December issue.

[141a] Denny Hotel Co. v. Schram (1893) 6 Wash. 134, 36 Am. St. R. 130, 1 Wilgus, Cases, 553. Note, Ib., p. 889.

[142] Nickum v. Burkhardtt, (1897) 30 Ore. 464, 60 Am. St. R. 822, 1 Wilgus, Cases, 391.

[143] Southwestern State Co. v. Stephens (1909) 139 Wis. 616, 131 Am. St. R. 1074, 29 L. R. A. (N. S.) 92, 120 N. W. 408.

[144] Sedalia, Warsaw etc. Co. v. Wilkerson, (1884) 83 Mo. 235, 1 Wilgus, Cases, 459; Coppage v. Hutton (1890) 124 Ind 401, 7 L. R. A. 591, 1 Wilgus, Cases, 469.

[145] Tonica & Petersburg R. R. Co. v. McNeeley (1859) 21 Ill. 71, 1 Wilgus, Cases, 491.

impliedly;[146] (4) That such a subscription is a mere withdrawable offer to the future corporation, but a contract among the subscribers.[147] Where the courts have not already passed on it, it is impossible to tell which view they will take. Of course if all goes well, and the corporation is duly formed and accepts the subscriptions made, they will be binding, but until that time there is always great uncertainty from the possibility of death or withdrawal of a subscriber. The difficulty of the courts is that "it takes two to make a contract," and, since the corporation cannot be bound until it comes into existence and has proper officers to bind it, the other party cannot be bound. To get around this view subscriptions are sometimes made with a trustee for the unborn corporation, which a court of equity will enforce in its favor whenever the corporation comes into existence.[148]

Parties to a Trust:

This again shows the simpler theory that underlies the trust. If A gives money or other property to B, in trust for C, or even if A declares that he holds money or other property in trust for C,—C whether in existence at the time or not, whenever he comes into existence, at least if within the rule relating to perpetuities, can enforce the trust in equity. In other words only one party or person is necessary to declare a trust; all the trustee has to do is to accept it expressly or impliedly, and the beneficiary does not have to do that. All that is required is for the settlor to express an intent to create a trust, and designate some one a trustee, and some one a beneficiary.[149]

Of course this declaration of trust must be distinguished from a gift. If I write a letter to my son saying "I give you my Blackacre estate, my lease-hold house in the High Street, the sum of £1000. Consols standing in my name, the wine in my cellar," this does not create a trust, nor does it make a valid gift for a letter will not do to make such conveyances; even if I execute a deed covenanting to convey and assign these things, there is not yet a trust nor a perfect gift, and the reason is "I make it clear I do not intend to make my-

[146] Bryant's Pond Steam Mill Co. v. Felt (1895) 87 Me. 234, 47 Am. St. R. 323, 1 Wilgus, Cases 474.

[147] Minneapolis Threshing Machine Co. v. Davis, 40 Minn. 110, 12 Am. St. R. 701, 3 L. R. A. 796, 41 N. W. 1026, 1 Wilgus, Cases, 492. Nebraska Chickory Co. v. Lednicky, (1907) 79 Neb. 587, 113 N. W. 245.

[148] San Joaquin Land Co. v. West (1892) 94 Cal. 399, 29 Pac. 785, 1 Wilgus, Cases 497; West v. Crawford (1889) 80 Cal. 19, 1 Wilgus, Cases 500.

[149] Ames, Cases, note p. 213; Kenneson's Cases, p. 89, 28 Am. & Eng. Encyc. of Law, p. 1100.

self a trustee, I mean to give" instead, and an intention to give, without delivering the gift is not a gift. "The two intentions are very different, the giver means to get rid of his rights, the man who is intending to make himself a trustee intends to retain his rights but to come under an onerous obligation." "An imperfect gift is no declaration of trust."[150]

"Every person who can hold and dispose of any legal or equitable estate or interest in property, may create a trust in respect of such estate or interest,"—the state, a private corporation, married women, an infant at least till he avoids it, and aliens and non-residents.[151] Still further it is the constitutional right under the Federal constitution of a citizen of one state to constitute a citizen of another state a trustee of his property real or personal, wherever the property is located. The Indiana statute forbidding this was declared unconstitutional.[152]

So too any kind of property may be held in trust; real, personal, legal, equitable, in possession or in action, (if assignable), in remainder, reversion, or expectancy, domestic or foreign, can be the subject of a declaration of trust, subject to the rules above given.[153]

Any one capable of holding property, may be a trustee, an infant, married women, corporation, or alien, or even a person of unsound mind. And in the case of an infant or lunatic, trustee, a court of equity can vest the title in some suitable person to carry out the trust. One of several beneficiaries may be a trustee if the settlor so appoints.[154]

So too any one can be a beneficiary,—infants, married women, corporations, unincorporated bodies, residents or non-residents, any one capable of taking and holding any kind of property and no acceptance by the beneficiary is necessary.[155]

The other three requisites of corporate existence named by Lord Coke,—name, place, and proper words, along with some others are provided for under general laws in the Incorporation Paper. This usually requires (1) the name, (2) the place, (3) the purpose, (4) the capital stock, (5) the number of directors, and (6) the duration

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[150] Maitland, Equity, pp. 73, 74.

[151] 27 Am. & Eng. Encyc., 1st Ed. 13.

[152] Sears, Trust Estates etc., p. 194; Farmers' Loan & Trust Co. v. Chicago etc. Ry. Co. (1886) 27 Fed. Rep. 146; Roby v. Smith (1891) 131 Ind. 342, 20 N. E. 1093.

[153] 27 Am. & Eng. Encyc. 1st Ed. 24, 25. Note, Ames, Cases, p. 193.

[154] 27 Am. & Eng. Encyc. 1st Ed. 16, 17; Cook, Trusts & Trustees, §§ 110-118.

[155] 27 Am. & Eng. Encyc. 1st Ed. 23; Ames, Cases, pp. 215-231; Kenneson, Cases, 90-97; Loring, Trustees Handbook, p. 15 (3d Ed.); Connecticut Riv. Sav. Bank v. Albee (1892) 64 Vt. 571, 33 Am. St. R. 944.

to be stated.[156] The purpose of course of this Incorporation Paper is to give definite form to a particular corporation,—to make specific for a single corporation what is general and applicable to all corporations of that class.

Although as we have seen no formal instrument is necessary to the creation of a valid trust, yet in the cast of an express trust for business a deed or declaration of trust is drawn up: (1) Providing for a name; (2) Designating trustees, and providing for their succession; (3) Providing for the raising and conveying the trust *res* or fund to the trustees, and defining their rights, powers and duties in reference thereto; (4) Providing for the issue of transferable certificates to those who are the *cestuis que trust,* in proportion to their respective beneficial interests in the property and profits; (5) Providing for division of profits; (6) Limiting liability of trustees and beneficiaries; (7) Fixing the duration, and providing for dissolution at the termination of the trust.[157]

These are so similar to the requirements of the incorporation paper that they may be taken up in order and compared with some detail.

Corporate Name:

It was long ago said that the corporate name is a baptismal one, and of the very being of the corporate constitution. It is now universally required to be stated in the incorporation paper, although it perhaps could be acquired under the common law by user. When rightfully acquired the corporation is considered as having a franchise therein, with the same exclusive right to its use in the incorporating state that it would have in a trade mark, including the right to enjoin its use by another domestic corporation. In several states particular provisions exist in relation to the selection and publication of the corporate name that must be strictly complied with. It has been held that a change of corporate name without authority, makes the members liable as partners.[158]

Trust Name:

In the absence of a statute forbidding, a natural person may do business in his own name or in any name he pleases to assume as a business name, so long as it does not infringe another's right in a

[156] 1 Wilgus, Cases, pp. 435-440.
[157] Conyngton, Corporate Organization, p. 366.
[158] 1 Wilgus, Cases, pp. 816-829.

name already in use by the latter.[159] Since the trustees are natural persons, they may choose such name in which to carry on business if they so desire, or the name may be, probably should be and usually is designated in the deed of trust, as for example, a trust deed in which Richard Olney, Moorefield Storey and William F. Beal are trustees (and therefore likely to have been drawn with the utmost legal skill) provides: "49. The trusts of these presents may be collectively designated for all purposes thereof as the *Old South Building* Trust, and the Trustees may for the like purposes be referred to as the Trustees of the Old South Building Trust."[160]

Another signed by similarly distinguished lawyers, provides; "First. The trustees, in their collective capacity, shall be designated, so far as practicable, as the "Massachusetts Electric Companies," and under that name shall, so far as practicable, conduct all business and execute all instruments in writing, in performance of their trust."[161]

Some states have statutes, as has Michigan, providing that "No person or persons shall hereafter carry on or conduct or transact business in this state under any assumed name, or under any designation, name, or style, corporate or otherwise, other than the real name or names of the individual or individuals *owning,* conducting, or transacting, such business, unless such persons shall file in the office of the clerk of the county or counties in which such person or persons own, conduct, or transact or intend to own, conduct or transact such business, or maintain an office or place of business, a certificate setting forth the name or names under which such business owned is, or is to be conducted, or transacted and the true or real full name or names of the person or persons owning, conducting or transacting the same, with the home and post office address or addresses of said person or persons,"[162] under specified penalty for failure. By a later provision this was specifically extended to partnerships, and no change in name shall be made until a new certificate shall be filed giving the facts, the old members remaining liable until this new certificate is filed.[163]

This of course would apply to trustees carrying on business under an artificial name. And presumably, also, if the trust is so organized

[159] Sparks v. Dispatch Transfer Co. (1891) 104 Mo. 531, 24 Am. St. R. 351. Note, 132 Am. St. R. 571. Mutual Benefit Life Ins. Co. v. Cummings, — Ore. —, 133 Pac. 1169, 47 L. R. A. N. S. 252.

[160] Conyngton, Corporate Organization, Form 62.

[161] Sears, Trust Estates, etc., p. 287.

[162] Public Acts, Mich. 1907, No. 101, p. 119.

[163] Public Acts, Mich. 1913, No. 164, p. 286.

as to make the beneficiaries partners, all their names would have to be given. This however should and can be avoided. Such statements as the above are generally required in annual reports of corporations, and are not more onerous than they are.

Corporate Domicile:

I have already referred to the uncertainty of the statutory provisions relating to *place* or *location*. Where the New Hampshire statute provided that the incorporation paper should state the "place in which its business is to be carried on," and the paper drawn by a supposedly competent attorney, stated "the places of business were Nashua in New Hampshire, and East Brookfield, in Massachusetts," and the manufacturing business was done at East Brookfield, and the corporate meetings held at Nashua, the Massachusetts Supreme Judicial Court, held there was no corporation *de jure, de facto,* or by *estoppel,* and the treasurer was individually liable on a note given as the corporation's note.[164] So too corporations are frequently dissolved for failure to maintain a domiciliary office in the incorporating state, whether the statute so requires or not. It was formerly held that corporate stockholders' meetings could not lawfully be held outside of the creating state because in the very nature of things the incorporating statute conferring such a privilege or franchise, is necessarily inoperative beyond such state, and outside of such state the assembled stockholders are possessed of only their natural powers.[166] This doctrine is gradually passing away, and in the absence of statutory provisions controlling, and with provisions in the incorporation paper so authorizing, it is now reasonably safe to hold shareholders meetings outside the creating state.[167] However there are so many conflicting decisions and statutory provisions that it is never wise to advise such to be done.[168]

Trust Domicile:

Upon the other hand since Trustees act not under any special privilege or franchise from the state, but under their common law and constitutional right as citizens of one state to do business there

[164] Montgomery v. Forbes, (1889) 148 Mass. 249, 19 N. E. 342, 1 Wilgus, Cases, 594.
[165] Frost, Incorporation and Org. of Corp., pp. 64, 65 (4th Ed.).
[166] Miller v. Ewer (1847) 27 Me. 509, 46 Am. Dec. 619, 1 Wilgus, Cases, 841.
[167] Missouri Lead etc. Co. v. Reinhard (1893) 114 Mo. 218, 35 Am. St. R. 746, 1 Wilgus, Cases, 844; Graham v. Boston etc. R. R. (1886) 118 U. S. 161, 1 Wilgus, Cases, 846, note p. 847.
[168] Machen, Corp. § 1212.

or in another, there is no difficulty as to "place of business," and no place of business is usually stated, further than to designate the city in which annual or other meetings are to be held. Here again the Trust is simpler.[169]

Corporate Purposes:

Incorporation statutes frequently provide for incorporation "for any lawful purpose" with certain exceptions, usually of a public service character. There is frequent difficulty in determining whether two or more purposes can be joined in one incorporation paper; the statutes in some states expressly authorize this; in some states the state officials so construe their ambiguous statutes; in others the statutes divide business into classes, which cannot be joined; in still other states only one purpose or general object can be claimed; while in still others, the name of the corporation must indicate the various purposes. This serves to indicate the confusion, and the difficulty encountered here.[170] This is mitigated however somewhat by the rule that things that cannot be properly claimed are mere surplusage, and can be rejected. This however would not help out an incorporation paper where two objects are joined when only one is permitted, but either of which would be valid if standing alone. Perhaps the corporation would be permitted to elect, and amend the paper, and thereafter carry on the one line of business elected. In any event the "object" clauses of an important corporation paper requires special skill and care in drawing.

Trust Purposes:

There seems to be no such difficulty, or in fact no such limitations, applying to Trusts. They can be created to carry on any lawful business or businesses desired, one or many as the parties, the declarants and the trustees provide for, unless there are express statutory limitations. They have been created for manufacturing, mining, lumbering, agriculture, transportation, mercantile, real estate, holding shares, disposing of patents, and numerous other purposes.[171] And as we saw above "Every kind of valuable property, both real and personal, that can be assigned at law may be the subject-matter of a Trust.[172] Here again with equal attention the purposes for which a Trust may be formed may be more certainly provided for than in similar incorporation papers.

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[169] See Forms, given in Sears, Cook (Corp.) and Conyngton (Corp. Organization).
[170] Frost, Incorp. and Organ. Corps., p. 19 et seq.; Machen, Corps., §§ 46-108.
[171] Sears, Trust Estates etc., p. 253.
[172] Perry, Trusts, 6th Ed., § 67.

For instance in the Massachusetts Gas Companies, the declaration of trust authorized its trustees to engage: (1) in manufacturing, buying, selling and dealing in coal, oil, coke, gas and all products thereof: (2) in manufacturing and supplying gas or electricity or any other agent for light, heat, power or other purposes; (3) in acquiring, owning, managing, exchanging, selling and dealing in the stocks, shares and securities of corporations, trusts or associations, engaged in whole or in part in any business above mentioned, or in owning and operating railways or railroads or transporting passengers, merchandise, mails or express matter, or in manufacturing, selling or repairing machines, equipments supplies or other articles used by corporations, trusts or associations of any of the classes above mentioned. * * * * (4) in any business similar in character to that above mentioned which the trustees may deem expedient," and to acquire, hold and dispose of the stocks of such institutions.[173]

Corporate Stock:

The theory of the capital stock of a corporation is that the power to have such, or increase or decrease it, is a corporate franchise, and must be expressly conferred by the state, or otherwise it does not exist.[174] Incorporation statutes frequently fix maximum and minimum limits, and sometimes limit indebtedness to the amount of capital stock, also special provisions are almost always made in reference to increase or decrease of the same, otherwise unanimous consent of shareholders, as well as the consent of the state would be necessary.[175] Under all the incorporation laws, the incorporation paper must state the number of shares, and the par value thereof (except now in New York) and these cannot be changed except by an amendment made to the articles of incorporation. In the absence of statutory provisions preventing, in the original organization of the company, preferred and common stock may be provided for in the incorporation paper, but not so afterward except by uanimous consent, unless there are statutory provisions making other regulations.[176] In several states as in Michigan the statutes provide for a certain kind of redeemable preferred stock with a limited dividend; in such states other kinds of preferred stock, or with greater dividends cannot be provided for. In some states the statute, because

[173] Sears, Trust Estates, p. 303.

[174] Cooke v. Marshall (1899) 191 Pa. St. 315, 1 Wilgus, Cases, 761.

[175] Railway Co. v. Allerton (1873) 85 U. S. (18 Wall.) 233, 1 Wilgus, Cases, 442, note 763.

[176] Kent v. Quicksilver Mining Co. (1879) 78 N. Y. 159, 1 Wilgus, Cases, 790, note 793; Campbell v. Zylonite Co. 121 N. Y. 455.

the common law was otherwise, expressly provides "that each shareholder shall be entitled to one vote for each share held." In such a state can non-voting preferred shares be created? This is answered differently in different jurisdictions.[177] In some states there is a statutory liability attaching to the ownership of stock, and our Supreme Court has just held that when a corporation organized in one state having no such statutory liability, is expressly authorized to do business in a state having such liability the shareholders become liable thereon for business done in such state.[178] This makes stock holding in corporations organized to do business throughout the United States a precarious matter.

Trust Stock:

How is it with Express Trusts? Can they be created with a capital stock represented by transferable shares? Or can the property held in trust by the trustees be represented by shares issued by the trustees, transferable, so as to give purchasers the same rights as original beneficiaries?

There is no doubt now, but that at Common Law, under merely their power to contract, individuals may between themselves engage in business together, each contributing property thereto, and take certificates representing their interests, which they may if the agreement so provides transfer to others. For 100 years or so, 1720 to 1825, the English Bubble Act forbade this, but this was repealed in England, and was never, or if at all, only to a very limited extent in force in this country. The courts in this country have held from the beginning that this could be done,[179] and now hold, that although by constitutional provisions "corporations can be created only under general laws" and corporation is defined in the constitution to "include all associations and joint stock companies having any of the powers and privileges of corporations not possessed by individuals or partnerships," and there is no statute authorizing the creation of joint stock companies with transferable shares, still, such institutions can be created by contract among individuals under the exercise of their common law rights and not be corporations. Such was the holding in a well considered Idaho case, following many similar decisions in other states.[180] There is therefore no law against doing this. Still further we have already seen that the in-

[177] State v. Swanger, 190 Mo. 561, 89 S. W. 892; Colonist Printing etc. Co. v. Dunsmuir, 32 Can. Sup. Ct. 679.

[178] Thomas v. Matthiessen (1913) 232 U. S. 221.

[179] 1 Wilgus, Cases, note p. 175. Sears, Trust Estates, §§ 52-54.

[180] Spottswood v. Morris (1906) 12 Id. 360, 6 L. R. A. (N. S.) 665, 85 Pac. 1094.

terest of a beneficiary is substantially a property right inheritable, descendible, and transferable as other rights are. The 9th section of the English Statute of Frauds required an assignment to be in writing; and since the beneficiaries' rights are not those of joint or co-tenants in the trust fund, but wholly incorporeal and intangible, just what the trust declared provides, the most natural way to represent them is by a certificate, and the most natural and convenient way of transfer is by an assignment of the certificate. In *Estate of Oliver,* the Pennsylvania Supreme Court, held that the interest of the stockholder "was an interest in the profits made. He had no title to the land bought by the trustees for the company, as a tenant in common or otherwise and could neither convey nor encumber it. His interest in it was personal estate and the extent of that interest was shown by his cerificate of stock."[181]

The following are illustrations of the stock provisions in a few Trusts:—

"*Central Massachusetts Light and Power Co.* The beneficial interest in the trust created by its agreement and declaration of trust is divided into 6,500 preferred shares and 6,500 common shares. The latter have no par value. The former have a par value of $100, are entitled to cumulative preferred dividends of 5 per cent the first year and increasing thereafter yearly to 6 per cent after May 15, 1918. The preferred shares have a preference in liquidation and are entitled to $110 if the trust is terminated within two years, and to amounts increasing thereafter yearly up to $125 if the termination occurs after May 15, 1918."[182]

The *Worcester Railways and Investment Company* issued "negotiable certificates or evidences of interest for 60,000 shares, each share representing a fractional beneficial interest of 1/60000 in" its property, the trustees having discretion to fix the dividends thereon.[183]

The capital of the *Massachusetts Light and Traction Companies,* is "divided into 100,000 shares of the par value of $1.00 each, bearing 5 per cent. non-cumulative dividends, to be designated as "preferred A stock," 50,000 shares of the par value of $5.00 each, bearing 6 per cent. non-cumulative dividends, to be designated "preferred B stock," and 10,000 shares of the par value of $25,000, of common stock."[184]

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[181] Oliver's Estate (1890) 136 Pa. 43, 20 Am. St. R. 894.

[182] Report (No. 1788 House) of Special Commission, Mass., on Voluntary Associations (1913) p. 40.

[183] Ib. p. 20.

[184] Ib. p. 44.

It would seem again here that the Express Trust is much more flexible than the usual corporation provisions are in reference to shares, there being no state to interfere, or statute to follow, and the whole matter can be moulded to suit the parties, and may be changed in any way or at any time, in accordance with such provisions as may be inserted in the trust agreement. The only point of difficulty here is in reference to partnership liability, a matter which is considered later on.

Corporate Directors:

Statutes usually require the number to be stated, and when once fixed can be changed only by an amendment regularly adopted. Statutes also usually require them to be shareholders to the extent of a few shares. Being elected there is no power of removal, unless expressly provided for in the statute, incorporation paper, or by-laws. By perhaps all business corporation statutes there must be directors, and in them the ordinary powers of the corporation are vested.[186] They however have no legal or equitable title to the corporate property. They act only in duly called meetings.[187] Their functions are *sui generis,* and have been likened to those of agents, trustees or mandatories of the corporation, but perhaps they are strictly neither.[188] Directors, however, are not agents of the shareholders, and except in certain peculiar situations are not generally said to be in a position of trust toward them.[189] Courts are not in accord upon the degree of care and diligence required of directors, one line of authorities saying that the care and diligence that an ordinarily prudent man takes of his own business, is required, while another line of authorities says, since they get no pay, no greater care is required than that required of a gratuitous bailee.[190] They have no authority to sell or dispose of the corporate capital or property, except such as is properly done in the ordinary course of business. For defaults of the directors affecting all the shareholders alike, they are primarily liable only to the corporation, and

[185] In the Matter of Election of Directors, 63 N. J. L. 168, 2 Wilgus, Cases, p. 1744.

[186] Blood v. La Serena, 113 Cal. 221; Metropolitan Elev. R. R. Co. v. Manhattan El. Ry. Co. (1884) 11 Daly (N. Y.) 373, 1 Wilgus, Cases, 694, note 702.

[187] Bank of Little Rock v. McCarthy (1892) 55 Ark. 473, 29 Am. St. R. 60, 1 Wilgus, Cases, note 850.

[188] Allen v. Curtis (1857) 26 Conn. 456, 2 Wilgus, Cases, 1727; Ellis v. Ward (1890) 137 Ill. 509, 2 Wilgus, Cases, 1729; Wallace v. Lincoln Sav. Bank (1891) 89 Tenn. 630, 24 Am. St. R. 625, 2 Wilgus, Cases, 1731.

[189] See "Purchase of Shares of Corporation by a Director from a Shareholder," by H. L. Wilgus, 8 Mich. Law Rev. (Feby. 1910) p. 267.

[190] North Hudson Building & Loan Assn. v. Childs (1892) 82 Wis. 460, 33 Am. St. R. 57, 2 Wilgus, Cases, 1737. See also 2 Wilgus, Cases, pp. 1874-1888.

only when they so control the corporation as to prevent it from bringing a proper action to protect itself amounting to a substantial breach of trust, can the shareholder bring a representative suit in equity to prevent a failure of justice. Courts of equity have no special jurisdiction over directors merely as such. It is only when there is a breach of trust upon their part, that they can be called to account in equity.[191]

Trustees of Trusts:

In case of the Trust, the Trustees stand, so far as control and management are concerned, if the Trust agreement so provides, in a position somewhat analogous to that of directors in a corporation. They, however, exercise control, because they are the owners of the property, and not the agents of the beneficiaries, or of any one else. They act as owners, but as owners that are obliged to render an account in equity not merely to all the beneficiaries as a whole, but to each and every beneficiary; for the beneficiary's right is individual, and *in personam,* and enforceable in equity primarily, not secondarily, against the trustee.[192]

A trustee has whatever estate either legal or equitable is necessary for him fully to carry out the trust created but no further;[193] and (1) "A trustee is bound to do anything that he is expressly bidden to do by the instrument creating the trust. (2) A trustee may safely do anything that he is expressly authorized to do by that instrument, even loan or invest money without adequate security. (3) A trustee is bound to refrain from doing anything that is expressly forbidden by that instrument. (4) Within these limits a trustee must play the part of a prudent owner and a prudent man of business," not as if he had himself alone to consider, but also "for the benefit of other people for whom he felt morally bound to provide."[194]

Upon the other hand, however, just because the trustee is owner of the property, if the trustee dies intestate his estate devolves upon his heir or personal representative if he had a fee; so also he can devise the estate, or convey it *inter vivos*;[195] in fact "At law the trustee has all those powers of alienating *inter vivos,* mortgaging and

[191] Dodge v. Woolsey (1855) 59 U. S. (18 How.) 331, 1 Wilgus, Cases, 88; Hawes v. Oakland (1881) 104 U. S. 450, 2 Wilgus, Cases, 1716.

[192] Ames, Cases, pp. 235-278.

[193] Reichert v. Missouri & Ill. Co. (1907) 231 Ill. 238, 121 Am. St. R. 307, 83 N. E. 166.

[194] Maitland, Equity, p. 98; Cook, Trusts & Trustees, § 127; Whiteley v. Learoyd, 33 Ch. D. 355, 12 A. C. 722, 25 Eng. Rul. Cas. 326.

[195] Maitland, Equity, pp. 86-90.

so forth that he would have were there no trust in existence," but of course any heir, devisee, executor, administrator or party taking with notice is bound by the trust. To prevent these results several trustees are appointed to hold as joint-tenants, with its attendant survivorship.[196]

Unlike directors the act of a majority of trustees does not bind the minority, all must join in a conveyance, or in a receipt. They are not at all agents for one another, nor can one shelter himself by saying he was out voted, if he, nevertheless, acquiesced in the action taken.[197] Of course, however all of these matters can be modified to suit the wishes of the settlor.

The following from the declaration of trust of the Massachusetts Gas Companies,—a manufacturing trust,—indicates what may be done:[198]

"The trustees shall hold the legal title to all property at any time belonging to this trust, and subject only to the specific limitations herein contained, they shall have the absolute control of the conduct of all business of the trust; and the following enumeration of specific duties and powers shall not be construed in anyway as a limitation upon the general powers intended to be conferred upon them.

"The Trustees shall have authority to adopt and use a common seal; to make all such contracts as they may deem expedient in the conduct of business of the trust; from time to time to release, sell, exchange, or otherwise dispose of, at public or private sale, any or all of the trust property, whether real or personal, for such prices either in cash or the stocks, shares, or securities of other corporations, trusts or associations and upon such terms as to credit or otherwise as they may deem expedient; to guarantee or assume the obligations of other corporations, trusts or associations and to enter into such agreements by way of indemnity or otherwise as they may deem expedient in connection with the acquisition of property from the subscribers as hereinbefore provided or otherwise; to confer, by way of substitution, such power and authority on the President, Treasurer, Secretary, and Executive Committee, and other officers and agents appointed by them, as they may deem expedient; to borrow money for the purposes of the trust and give the obligations of the Trustees therefor; to loan any money from time to time in the

[196] Maitland, Equity, p. 93.

[197] Reichert v. Missouri etc. Coal Co. (1907) 231 Ill. 238, 121 Am. St. R. 307, 83 N. E. 166; Mattison v. Mattison (1909) 53 Ore. 254, 100 Pac. 4, 133 Am. St. R. 829; Adams' Estate (1908) 221 Pa. 77, 70 Atl. 438, 128 Am. St. R. 727, Estate of Fesmire, 134 Pa. St. 67, 19 Am. St. 676.

[198] Sears, Trust Estates etc., p. 303.

hands of the Trustees, with or without security, on such terms as they may deem expedient; to subscribe for, acquire, own, sell or otherwise dispose of such real or personal property including the stocks, shares, and securities of any other corporations, trusts, or associations, as they may deem expedient in connection with the purposes of the trust; to vote in person or by proxy on all shares of stock at any time held by them, and to collect and receive the income, interest, and profits of any such stock or securities; to collect, sue for, receive, and receipt for all sums of money at any time becoming due to said trust; to employ counsel and to begin, prosecute, defend, and settle suits at law, in equity or otherwise, and to compromise or refer to arbitration any claims in favor of or against the trust; and in general to do all such matters and things as in their judgment will promote or advance the business which they are authorized to carry on, although such matters and things may be neither specifically authorized nor incidental to any matters or things specifically authorized. In addition to the powers herein granted the Trustees shall have all power with reference to the conduct of the business and management of the property of the trust which are possessed by directors of a manufacturing corporation under the laws of Massachusetts.

"So far as strangers to the trust are concerned a resolution of the Trustees authorizing a particular act to be done shall be conclusive evidence in favor of strangers that such act is within the power of the Trustees; and no purchaser from the Trustees shall be bound to see to the application of the purchase money or other consideration paid or delivered by or for said purchaser to or from the Trustees.

"Stated meetings of the Trustees shall be held at least once a month, and other meetings shall be held from time to time upon the call of the President or any three of the Trustees. A majority of the Trustees shall constitute a quorum; and the concurrence of all the Trustees shall not be necessary to the validity of any action taken by them, but the decision expressed by a vote of a majority of the Trustees present and voting at any meeting shall be conclusive."

Other provisions authorize the adoption of by-laws, election of officers, and executive committee, and agents, accepting resignations, removing officers, filling vacancies, keeping records, etc.

Also "The Trustees shall not be liable for any error of judgment or for any loss arising out of any act or omission in the execution of this trust, so long as they act in good faith, nor shall they be personally liable for the acts or omissions of each other, or for the acts or omissions of any officer, agent, or servant elected or appointed by

or acting for them; and they shall not be obliged to give any bond to secure the due performance of this trust by them.

"Any Trustee may acquire, own, and dispose of shares in this trust to the same extent as if he were not a Trustee."

Corporate Life or Duration:

We have seen that corporations were often said to be immortal. This of course meant that there was continuous or perpetual succession for an indefinite and unlimited time unless the corporation was dissolved in some of the ways known to the law,—loss of all members, act of Parliament, surrender of franchises, or quo warranto for misuser or non-user.[199] This is still the law, unless there are constitutional or statutory provisions to the contrary, but there are such in nearly ever state, the limit fixed being usually from 20 to 50 years, and in many cases the proposed duration must be stated in the Incorporation Paper. In many states a renewal may be had for a like period. With us the Legislature has no right to dissolve unless the power to do so is reserved to the State.[200] However, through quo warranto proceedings for violation of duty injuriously affecting the public, the courts may pronounce judgment of dissolution.[201] During the whole of its prescribed life, the corporation is said to have perpetual or continuous succession, and remains the same corporation regardless of any change in membership.

Trust Duration:

In this respect, because of the "rule against perpetuities," the corporate organization seems simpler than the Trust form. This rule in all its applications is exceedingly intricate and technical, and frequently papers, especially wills, drawn by the best lawyers have contained provisions that have been rendered ineffective because offending against the rule. In the matter of an ordinary business trust, however, while perhaps a perpetual or immortal existence cannot be acquired, an existence that is as long as or in many cases much longer than the ordinary corporate life can be obtained.

The English rule seems to have two branches, one relating to the vesting of future estates, and the other to trusts for accumulations. These may be stated: (1) "Every future contingent estate limited

[199] State v. Payne (1895) 129 Mo. 468, 1 Wilgus, Cases, 830; Boston Glass Manufactory v. Langdon (1834) 24 Pick. (Mass.) 49, 35 Am. Dec. 292, 1 Wilgus, Cases, 866.

[200] Trustees of Dartmouth College v. Woodward (1819), 4 Wheat. (U. S.) 518, 1 Wilgus, Cases, 708.

[201] People v. Dashaway Association (1890) 84 Cal. 114, 2 Wilgus, Cases, 1298.

to arise on an event that might possibly happen later than 21 years and the period of gestation after the death of persons living at the creation of the estate is void the day it is created."[202] (2) "Where property, real and personal, is given to trustees to hold and to receive and invest the rents and profits of the real property and the income of the personal property, and to deliver the property and income at a certain or contingent future time to the beneficiaries, if that time may possibly happen more than 21 years and the period of gestation after the death of persons living at the creation of the trust, the direction to accumulate and the gift of the accumulated fund are void absolutely."[203]

Neither of these rules would seem to prevent the creation of trusts for indefinite periods, as A grants property to B in fee to control and manage for C in fee, for each estate, the legal and equitable, is vested in the respective parties, and they together may at any time if they choose terminate the trust, and together convey an absolute title to the property.[204]

A recent writer however has said "The courts in this country seem to be moving very rapidly toward the general announcement of the rule that trusts of absolute indestructible equitable interests cannot be made to last for longer than lives in being and twenty one years, and that any provision which may by any possibility postpone the term of the trusteeship for longer than that period is wholly void from the beginning."[205]

It has been held in Illinois that where the trustees have the absolute power to sell at any time free of the rights of the beneficiaries, the rule does not apply;[206] and likewise in Massachusetts, if the income is not to be accumulated, but distributed as it accrues, and where the whole equitable interest is at every moment vested absolutely in the shareholders, and can be sold by them at any time, the rule does not apply;[207] but if the trustees and beneficiaries cannot together convey the complete title without violating the trust, the rule is violated.[208]

In New York the statute provides that "Every future estate shall be void in its creation which shall suspend the absolute power of alienation for a longer period than two lives in being. * * * Such

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[202] Rood, History of Real Property Law, § 27.
[203] 18 Am. & Eng. Encyc. (1st Ed.) pp. 381-382.
[204] Gray, J. C., Rule against Perpetuities, 2d Ed. (1906) § 236.
[205] Kales, Transfer of Title to Real Estate, § 72.
[206] Hart v. Seymour (1893) 147 Ill. 598.
[207] Howe v. Morse (1899) 174 Mass. 491, 55 N. E. 213.
[208] Winsor v. Mills (1892), 157 Mass. 362; Young v. Snow (1897) 167 Mass. 287.

power of alienation is suspended when there are no persons in being by whom an absolute fee in possession can be conveyed." Under this statute it has been held that if the trust term is longer than the period of two lives in being, but the trustees have at all times the power to convey the complete title neither the rule nor statute is violated.[209] And where the trust is for the sole benefit of the settlors or their appointees, the rule does not apply, even though the beneficiaries are infants, or are numerous, and the entire interest cannot be disposed of without their consent.[210]

In New York, Michigan and Minnesota, the period seems to be two lives only; in Wisconsin, two lives and 20 years; in California, Idaho, North and South Dakota, the period is fixed by lives, in being at the creation, but there is no limitation as to number; in all other states the period is a "life or lives in being and 21 years thereafter."[211] The lives specified may be those of trustees, existing beneficiaries or strangers.[212]

The following are illustrations: The term of the *Boston* and *Worcester Electric Companies* is "twenty years after the death of the last survivor of 27 persons named in the agreement and declaration."[213] In the *Massachusetts Electric Companies* "The trust is to continue for the term of 21 years from the date of the agreement, unless the holders of at least two thirds of the shares then outstanding shall at a meeting called for that purpose vote for its termination or continuance."[214] The *Massachusetts Northern Railways* put it: "The trust is to continue for the term of twenty years after the death of the last survivor of ten persons" named, six of whom were the sons and daughters of the other four, three of whom were trustees; but at any time by a vote of 2/3 of the outstanding shares in a meeting called for the purpose, confirmed by the vote of 5/7 of the trustees, the trust can be terminated, and the property be distributed, or be sold and proceeds distributed.[215]

As has been pointed out a succession of trustees can be kept up by means of joint tenancies, or by provisions in the trust-deed, or if necessary to prevent failure by appointment of a court of equity,

[209] Robert v. Corning (1882) 89 N. Y. 225; Henderson v. Henderson (1889) 113 N. Y. 1.

[210] Beardsley v. Hotchkiss (1884) 96 N. Y. 201; N. Y. Life Ins. Co. v. Livingston (1892) 133 N. Y. 125; Hope v. Brewer (1892) 136 N. Y. 126; Holmes v. Walter (1903) 118 Wis. 409; Williams v. Montgomery (1896) 148 N. Y. 519.

[211] Sears, Trust Estates etc., pp. 137-138.

[212] Crooke v. King's County (1884) 97 N. Y. 421; Bailey v. Bailey (1884) 97 N. Y. 460.

[213] Report of Special Committee of Mass. House Reps. No. 1788, p. 7.

[214] Ib. p. 8.

[215] Ib. p. 15.

for it is a maxim that a trust shall not fail for want of a trustee.[216] So too if there is not a special confidence in the person, instead of in the office, of the trustee, no additional conveyances are necessary to keep up the succession of powers, rights and duties in the trustees.[217]

A little care in the drawing up the trust instrument may make the trust as convenient in this regard as the corporation.[218]

This brings us to a consideration of the corporation and trust obligations and liabilities. Here are important differences, in theory, and great care is necessary in drawing trust agreements or there is danger of unexpected or unusual liabilities.

Corporation Liabilities.

It results, of course, that because a corporation is a separate person in the law, that its rights and obligations are its own, and not those of any other persons. And this doctrine obtains universally except when this corporate personality is used to "defeat public convenience, justify wrong, protect fraud, or defend crime."[219]

It follows of course that if the corporation is properly organized, and the shareholders and officers do all they should do, and do nothing they should not do, no one is liable except the corporation for any obligations incurred. The theory is that the creditor must look to the *capital stock* of the corporation for his protection; and this capital stock is frequently called a *"trust fund"* for the protection of creditors.[220] Yet this trust fund doctrine has been bitterly assailed, and it is held there is no liability on officers and shareholders, in the absence of statutory provisions, unless there is actual or constructive fraud, or ultra vires, or tortious or illegal acts upon their part.[221] Of course it is agreed that if there is a *trust fund,* it is peculiar, unlike ordinary trust funds, since there is no

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[216] Reichert v. Mission etc. Coal Co. (1907) 231 Ill. 238, 121 Am. St. R. 307; Dodge v. Dodge (1908) 109 Md. 164, 71 Atl. 519, 130 Am. St. R. 503, note 508; Smith v. Davis (1891) 90 Cal. 25, 25 Am. St. R. 92; U. S. Casualty Co. v. Kacer (1902) 169 Mo. 301, 69 S. W. 370, 92 Am. St. R. 641.

[217] Kadis v. Weil (1913) 164 N. C. 84, 80 S. E. 229. Compare Maryland Casualty Co. v. Safe Deposit Co. (1911) 115 Md. 339, Ann. Cas. 1913 A 1279, note.

[218] See Forms given in Sears, Cook (Corp. 7th Ed.), Conyngton (Corp. Organ.).

[219] Smith v. Moore (1912) 199 Fed. 689. See also 10 Mich. Law Rev. 310; 12 Col. Law Rev. 496.

[220] Wood v. Dummer (1824) 3 Mason 308, 2 Wilgus, Cases, 1847; Scovill v. Thayer (1881) 105 U. S. 143, 2 Wilgus, Cases, 1907; Shields v. Hobart (1903) 172 Mo. 491, 95 Am. St. R. 529, 72 S. W. 669.

[221] O'Bear Jewelry Co. v. Volfer (1894) 106 Ala. 205, 54 Am. St. R. 31, 2 Wilgus, Cases, 1852; Hospes v. Northwestern Mfg. Co. (1892) 48 Minn. 174, 2 Wilgus, Cases, 1911; Hall v. Henderson (1900) 134 Ala. 455, 63 L. R. A. 673.

separation of the legal and equitable titles, and no special trusts and confidence existing between the corporation, corporate officers, or shareholders, and corporate creditors. The corporation owns the whole title legal and equitable to corporate property and the creditor has, merely as such, no lien upon it either at law or in equity, at least before insolvency.[222] And so it is held by the great weight of authority (in the absence of bankruptcy laws forbidding) that a corporation can lawfully prefer its creditors, even stockholder and director creditors, if it chooses, and there is no actual fraud.[223]

Nevertheless it is to a fund designated capital, or capital stock, and to that only, that creditors can look for protection. There is however much confusion as to exactly what is included in this fund. It perhaps can now be safely said to include all the corporate property, real, and personal, tangible and intangible, choses in possession and in action, up to an amount equal to the face value of the outstanding stock, but yet not to that extent, if the corporate capital has been dissipated by misfortune, and not by fault of responsible parties.[224]

There is however yet some uncertainty as to holding shareholders liable for unpaid stock, or for stock issued for overvalued property, or for dividends paid out of corporate capital.

New York has just held that under the law of that state shareholders in the absence of an agreement to pay up their stock, cannot be held by creditors to pay up.[225] As to payment of stock by property, one line of authorities holds that in the absence of actual fraud, established by the complainant, the judgment of the directors is final,[226] as where the three dummy incorporators and directors holding $3,000 of stock in the U. S. Steel Corporation, under the New Jersey law passed a resolution that the property proposed to be turned over to the company was equal in value to the face value of the stock and bonds, $1,410,000,000 to be issued for it. The Government experts however think there was $700,000,000 water in it. Another view is that it is only a question of fact to be determined by a jury when the question is submitted to them upon the facts put before them, and good faith will not protect;

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[222] Hollins v. Brierfield Coal Co. (1893) 150 U. S. 371, 2 Wilgus, Cases, 1868.

[223] Catlin v. Eagle Bank (1826) 6 Conn. 233, 2 Wilgus, Cases, 1815; Corey v. Wadsworth (1897) 118 Ala. 488, 2 Wilgus, Cases, 1836. Compare Rouse v. Merchants Natl. Bank (1889) 46 O. S. 493, 15 Am. St. R. 644, 2 Wilgus, Cases, 1819; Olney v. Conanicut Land Co. (1889) 16 R. I. 597, 27 Am. St. R. 767, 2 Wilgus, Cases, 1832.

[224] Am. Life and Acc. Ins. Co. v. Ferguson (1913)) 66 Ore. 417, 134 Pac. 1029; In re Wells Estate (1913) 156 Wis. 294, 144 N. W. 174.

[225] Southworth v. Morgan (1912) 205 N. Y. 293.

[226] Graves v. Brooks (1898) 117 Mich. 424, 2 Wilgus, Cases, 1950.

another rule is that a large difference in the actual value of the property and the face value of the stock issued is *prima facie* evidence of fraud and calls for explanation;[227] and still another view is that if the corporation is a "going concern," but nearly "gone," stock may be issued at a discount to takers in order to see, if perchance, it may be revived, at the expense of subsequent creditors.[228]

So, too, while it was originally held that the directors could not pay dividends to shareholders out of the corporate capital, yet our Supreme Court has held that where shareholders receive such dividends in good faith, supposing they were properly declared and paid out of profits instead of capital they may keep them,[229] and the creditor must whistle through the corporate whistle to the defaulting directors to make good their loss.

Then too there are statutory efforts to protect creditors, which for the most part are satisfactory to nobody. These are attempts to make officers and stockholders liable for corporate debts under such varying circumstances that it is difficult to tell what the liability is, whether penal or contractual,[230] primary or secondary,[231], limited or unlimited, separate or joint, or on prior, existing, or subsequent shareholders,[233] and whether enforceable outside of the state or not.[234] So too many states provide that all "fictitious issues of stock or bonds shall be void," yet courts have had great difficulty in giving effect to such provisions, for if the effort to issue stock at a discount is *void,* the statute would then hurt creditors more than in any other way, and defeat its own probable purpose.[235] On the other hand Montana has a statute that provides that stock may be issued for mining property taken at any value, and such stock shall be deemed to be wholly paid up.[236]

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[227] See cases cited in State Trust Co. v. Turner (1900) 111 Ia. 664, 82 N. W. 1029, 53 L. R. A. 136, 2 Wilgus, Cases, 1953. Compare 1 Cook, Corp., §§ 46-47.

[228] Handley v. Stutz (1891) 139 U. S. 417, 2 Wilgus, Cases, 1923.

[229] McDonald v. Williams (1899) 174 U. S. 397, 2 Wilgus, Cases, 1981.

[230] Wiles v. Suydam (1876) 64 N. Y. 173, 2 Wilgus, Cases, 1981.

[231] Umsted v. Buskirk (1866) 17 O. S. 113, 2 Wilgus, Cases, 1990.

[232] Hanson v. Donkersley (1877) 37 Mich. 184, 2 Wilgus, Cases, 1997.

[233] Harger v. McCullough (1846) 2 Denio (N. Y.) 19, 2 Wilgus, Cases, 1998; Bank of Poughkeepsie v. Ibbotson (1840) 24 Wend. (N. Y.) 473, 2 Wilgus, Cases, 2001; Foot v. Sinnock (1887) 120 Ill. 350, 2 Wilgus, Cases, 2003; Zang v. Wyant (1898) 25 Colo. 551, 2 Wilgus, Cases, 2005.

[234] Marshall v. Sherman (1895) 148 N. Y. 9, 2 Wilgus, Cases, 2021; Howarth v. Angle (1900) 162 N. Y. 179, 2 Wilgus, Cases, 2028; Whitman v. Oxford Bank (1900) 176 U. S. 559, 2 Wilgus, Cases, 2018.

[235] Van Cleve v. Berkey (1898) 143 Mo. 109, 42 L. R. A. 593, 2 Wilgus, Cases, 1953. Compare 1 Cook, Corp., § 47.

[236] Civil Code of Montana, § 3824, (Mar. 7, 1895).

Trust Liabilities.

(a) *Trustees liability*: As has been pointed out, in a Trust, the trustees are the owners of the property to the extent of any estate necessary for them to have under the instrument of trust to enable them fully to execute it. If it therefore gives to them full control, management, and disposition of the property, they acts as owners do, as principals and not as agents of others.[237] It would naturally follow from this that they bind themselves personally and themselves alone, in the absence of some provision to the contrary. The debts they incur are their personal debts, not those of the beneficiaries, nor of the trust fund.[238]

As was said by the United States Supreme Court in *Taylor* v. *Davis*,[239] "When an agent contracts in the name of his principal, the principal contracts and is bound, but the agent is not. When a trustee contracts as such, unless he is bound no one is bound for he has no principal. The trust estate cannot promise; the contract is therefore the personal undertaking of the trustee. As a trustee holds the estate, although only with the power and for the purpose of managing it, he is personally bound by the contracts he makes as trustee, even when designating himself as such. * * * Of course when a trustee acts in good faith for the benefit of the trust he is entitled to indemnity himself for his engagements out of the estate in his hands." As for instance where a broker secured a loan for the trustee for the benefit of the estate, the trustee promising to pay the commission out of the trust fund, it was held that the trust estate was not liable, but the trustee was personally.[240] And so where a note signed by A. B. Trustee, was taken by the payee with knowledge that it was for the benefit of the estate, yet the trustee was held personally liable.[241] Hill on Trustees states the rule "A trustee who carries on any trade with the trust assets for the benefit of the *cestuis que trust* will be responsible to the creditors, not only to the extent of the trust assets but also with the whole of his own

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[237] Loring, Trustees Handbook, pp. 25-29; Ames, Cases, 2d Ed., pp. 278-281; Kenneson, Cases, pp. 147-152.

[238] Loring, Trustees Handbook, pp. 29-31; Dunlevie v. Spangenberg (1910) 121 N. Y. S. 299, 66 Misc. 354.

[239] Taylor v. Davis (1884) 110 U. S. 330, 335.

[240] Johnson v. Leman (1890) 131 Ill. 609, 19 Am. St. R. 63, note 67; Connally v. Lyons (1891) 82 Tex. 664, 27 Am. St. R. 935; McIntyre v. Williamson (1900) 72 Vt. 183, 47 Atl. 786, 82 Am. St. R, 929.

[241] Roger Williams Natl. Bank v. Groton Mfg. Co. (1889) 16 R. I. 504; Mitchell & Co. v. Whitlock (1897) 121 N. C. 166.

[242] Hill, Trustees (Ed. 1846) p. 533; Woddrop v. Weed (1893) 154 Pa. St. 307, 35 Am. St. R. 832. But see Wright v. Railroad Co. (1909) 151 N. C. 529; Curry v. Dorr (1912) 210 Mass. 430, on 432.

property, and he may be made bankrupt and proceeded against in the same manner as any other trader, and it is immaterial that the trade is carried on by him in consequence of an express direction in the trust instrument; although the trust property will doubtless be primarily liable to creditors, and will be first applied so far as it will go in discharge of the liabilities."[242]

This of course is directly contrary to the liability of corporate directors, and is so different that, if it could not be modified it would deter competent business men from accepting such trusts. Can a trustee then exclude such liability by express stipulation to the contrary? It is clear he can. In *Shoe and Leather Bank* v. *Wood,*[243] it was held that there was not personal liability upon the trustees where they had executed a note reading "We as Trustees but not individually promise to pay," signed by themselves "Trustees;" and it is ruled, in the words of the syllabus in *Hussey* v. *Arnold,* "No action can be maintained against trustees, holding the property of an unincorporated association, on a contract made by them which by its terms is enforceable only against the property held in trust."[244] This has been more recently affirmed.[245]

Upon the stationery of the Massachusetts Gas Companies, printed in red ink, there appears the following, "The name 'Massachusetts Gas Companies' is the designation of the Trustees for the time being under an agreement and declaration of trust, dated 1902, and all persons dealing with the Massachusetts Gas Companies must look solely to the Trust property for the enforcement of any claim against the Companies, as neither the Trustees, Officers nor shareholders assume any personal liability for obligations entered into on behalf of the Companies."[246] In the Old South Building Trust deed it is provided that "In every written order, contract or obligation which the Trustees shall give, authorize or enter into, it shall be the duty of the Trustees to stipulate or cause to be stipulated that neither the Trustees nor shareholders shall be held to any personal liability under or by reason of such order, contract or obligation."[247]

In some of the older cases the exemption of the trustee from personal liability was placed upon the right of subrogation of the creditor to the trustees right of indemnity, and to that alone; so that if the trust estate was insolvent, or the trustee exceeded his

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[243] 123 Mass. 148 (1877).
[244] 185 Mass. 202 (1904).
[245] King v. Stowell (1912) 211 Mass. 246, 251.
[246] Sears, Trust Estates etc., p. 320.
[247] Conyngton, Corporate Organization, pp. 548, 556.

authority the trustee was still personally liable. Perhaps he still is in the latter case, but not in the former.[248]

But how about the liability of the beneficiaries? This depends apparently upon whether they are really and truly, and individually, beneficiaries only, of an existing trust, or whether they are associated together in such a way as in fact to be *partners* engaged in business for profit, the trustees being not really the owners of the property, but in substance and truth the agents of the associated beneficiaries. There has been much consideration given to these matters in Massachusetts.

In *Hoadley* v. *Commrs,*[249] the question was whether transferable shares in a trust were taxable as corporate shares would be, i. e., at the domicile of the owner, or where the trust property was located. *Held,* the latter, since they were shares in a partnership. Here the parties had "associated themselves to hold property and carry on business," "as the McKay Sewing Machine Association," but no member was to have any power to make any contract or transact any business for the Association, which was itself to be the equitable owner, and "the general management of the business" was "vested in an executive committee * * * to be chosen by the whole body of shareholders at a meeting called by the trustee for that purpose."

In *Gleason v. McKay,*[250] the same Association was involved, and the question was whether the Association should be taxed upon all its outstanding shares, as corporations were taxed. It was held not, on the ground it was a *partnership,* without any corporate franchise, and so not subject to the tax.

In *Whitman* v. *Porter,*[251] subscribers associated themselves together to buy a ferry boat to be conveyed to one in trust, to be managed by trustees and officers elected annually by subscribers, who were to have transferable shares for their interests in the "Agawam Ferry Co.;" the plaintiff in the case was one of the shareholders, who had advanced money to pay notes given for the purchase of the boat and to pay expenses and asked for contribution from the others, over and above their subscriptions to pay the amount due. *Held,* it was substantially a partnership, and "as between themselves they were ultimately liable in proportion to their interests. But as to creditors, each was liable for the whole."

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[248] Sears, Trust Estates, p. 40 et seq.; Loring, Trustees Handbook, p. 35.
[249] 105 Mass. 519 (1870).
[250] 134 Mass. 419 (1883).
[251] 107 Mass. 522 (1871).

In *Phillips* v. *Blatchford,*[252] money was raised to carry on the business of manufacturing grates, by sale of transferable certificates under deed of trust providing the business was to be carried on by a board of managers of whom the trustee was one, and the others were to be elected by the shareholders. Held to be a partnership.

In *Ricker* v. *Am. Loan & Trust Co.,*[253] another tax case, it was held that where those who provided the money for purchasing and selling cars, to be paid for in ten payments with six per cent interest, were declared to be an Association with the interests represented by transferable shares, the business to be managed by a board of managers named, subject to removal by the shareholders and others to be elected by them, the title of the property being taken in in trust by an incorporated trust company, a partnership was created, subject to taxation as other partnerships.

So too, in *William* v. *Boston,*[254] where a trust was organized to purchase the site of the Museum of Fine Arts, to be held by trustees, who should issue transferable shares to the subscribers, in whom in meeting assembled, was vested the power to instruct the trustees or remove them, and to alter or amend the declaration of trust, and to direct the trustees to sell the property, and although the deed specifically stated that neither the shareholders nor the trustees were to be personally liable for any obligations of the Trust, yet it was stated that a partnership for taxation purposes was created. In the later case of *Williams* v. *Milton* (infra) it was said this was a mistake, it was a *trust* and not a *partnership.*

On the other hand in *Mayo* v. *Moritz,*[255] an inventor transferred his invention to trustees, who were to issue to him one-half of a specified amount of scrip or transferable shares, the other half to be issued to subscribers who should furnish the trustees with money for carrying on the business. The Trustees were to hold, manage and dispose of the invention, as they thought best, and vacancies among trustees were to be filled by the remaining trustees, held this did not constitute a partnership.

The same view is taken in the still more recent case of *Williams* v. *Milton.*[256] This is also a taxation case. The Massachusetts statute provides that personal property held in trust, shall be taxed to the trustee where the beneficiary resides; and partners shall be jointly taxed in the firm name, where the business is done; the

[252] 137 Mass. 510 (1884).
[253] 140 Mass. 346 (1885).
[254] 208 Mass. 497 (1911).
[255] 151 Mass. 481 (1890).
[256] 215 Mass. 1 (1913).

business was done in Boston which sought to tax the Trust as a partnership doing business there.

The trust deed creating this Boston Personal Property Trust, "expressly declared that a trust, and not a partnership is hereby created; that neither the Trustees nor the *cestuis que trustent* shall ever be personally liable hereunder as partners or otherwise, but that for all debts the Trustees shall be liable as such to the extent of the Trust Fund only. In all contracts or instruments creating liability it shall be expressly stipulated that the *cestuis que trustent* shall not be liable."

"The Trustees shall have as full power and discretion, as if absolute owners, to invest and reinvest the Trust Fund, in personal property," to borrow money to extent of 25 per cent of property and pledge as collateral security any personal property belonging to the Trust Fund; to declare dividends in their discretion; to render an annual account; to resign,—vacancies to be filled by remaining trustees; to issue transferable certificates; to alter, add to or terminate the trust with the consent of three-fourths in interest of the *cestuis que trustent.*

The court by LORING, J., said: "Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and because (2) as a matter of convenience (if not of necessity in case of transferable and transmissible certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.

After reviewing the Massachusetts cases above referred to, the court points out that the difference between the partnership cases, (the *Hoadley, Whitman, Gleason, Phillips, Ricker and Williams* cases), on one hand and *Mayo* v. *Moritz* (the patent case) on the other, lies in the fact that in the former cases the *certificate* holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property. The property is their property. They are the masters. While in *Mayo* v. *Moritz* on the other hand there is no association between the certificate holders. The property is the property of the trustees and the trustees are the masters. All that the certificate holders in *Mayo* v. *Moritz* had, was a right to have the property managed by the

trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them." The court emphasizes that the only power the shareholders had was to consent to an alteration of the trust deed, but they had no power to direct or force the trustees to take any action. "It is the trustees, not the certificate holders, who are the masters of the trust property."

Similar or even more liberal views have been taken by other courts. The leading case on what constitutes a partnership is *Cox* v. *Hickman,* decided by the House of Lords in 1860.[257] In this case failing merchants assigned all their assets to trustees to carry on the business under the name of the company, for the benefit of creditors, with their consent, the deed of trust authorizing the creditors to accept the resignation of the trustees, appoint new ones, alter the trusts or direct the business to be discontinued. The trustees incurred liabilities. Held the trustees were not the agents of the creditors, and they were not liable as partners. There was perhaps no association here, although something like a composition among the creditors.

Very similar to the facts of *Cox* v. *Hickman,* is the well considered case of *Wells-Stone Mercantile Co.* v. *Grover.* Here by a deed of trust made by a debtor to a trustee the latter was to convert the property into money to pay the debtor's debts, make new purchases and carry on the business if he thought best. The creditors consented to this. The creditors were sued by plaintiff for goods sold to the trustee because he was authorized to make such purchases to keep up the stock. It was held, on demurrer, that neither the original debtor, nor the creditors were liable because no power of control was reserved over the trustee, and he was not the agent of the debtor nor the creditors. The trustee and the estate only were liable.

In the English case of *Smith* v. *Anderson,*[259] a deed of trust was made between six persons as trustees and another who covenanted for and on behalf of certain certificate holders, numbering over 20, who had subscribed for the purchase by the trustees of various shares in other companies, all of which had been transferred to the trustees, who were to issue transferable certificates therefor, upon which 6 per cent interest was to be paid from profits; the trustees were to make and change investments, if authorized by certificate holders, who were to have an annual meeting to hear reports and

[257] 8 H. L. Cas. 268, 19 Eng. Rul. Cas. 323.

[258] 7 N. D. 460 (1898), 41 L. R. A. 252, 75 N. W. 914. See also Wells-Stone Mercantile Co. v. Aultman (1900) 9 N. D. 520.

[259] 15 Ch. D. 247 (1880).

elect new trustees. Held there was no partnership, and the company was not illegal because it had not organized under the English Companies, act, which required every "company, association or partnership" carrying on business for gain by such company, association, or partnership, or by the individual members thereof, when they exceed 20 in number, to be registered. Held, it was not a partnership or company that required registration, and that the trustees were not agents of the shareholders, and that it was the trustees and not the shareholders who carried on the business.

The case of *Johnson* v. *Lewis*[260] was similar. The trust deed of 1873, was made between parties of the first part styled the trustees," others of second part called "the Committee," and others of third part called "covenantees," these latter were subscribers to a fund to purchase municipal bonds, to be purchased by the committee, and put into hands of the trustees in trust to manage. The subscribers were to receive transferable certificates for their interests. The court by CALDWELL, J., held: the trustees were the legal owners of the trust property and the business of the trust was managed by them; and the committee created by the deed for the benefit of the certificate holders were strangers to each other and entered into no contract between themselves, nor with any trustee on behalf of each other, and they were not therefore partners.

The Court of Appeals of New York have just recently held the same way, in the case of *Jones* v. *Gould*.[261] Here Gould and two others were to purchase a line of railroad, extend the same, and build another to coal lands to be purchased by them; they were to do all acts necessary to construct or purchase said properties, and for that purpose absolutely to control the property so to be constructed or purchased as fully in all respects as if they were the absolute owners thereof. The enumeration of the specific powers was not to be construed as limiting the general powers conferred upon the managers. By the agreement the defendants (Gould et al.) contracted to purchase the properties on such terms as they thought the best obtainable, and, on the other hand, the subscribers *agreed with each other and with the defendants* (Gould et al.) to pay the amounts of their respective subscriptions from time to time as called for by the latter, but they were to be liable only to defendants, and then only to the amount of the subscription.

The court *per curiam* held, "We are of the opinion that under the syndicate agreement the relation between the subscribers and the

[260] 6 Fed. 27 (1880).
[261] 209 N. Y. 419, 103 N. E. 720 (1913).

managers (the defendants, appellant) was not that of principal and agent (though doubtless fiduciary) but that the managers themselves became the principals in any contract which they might make."

There are many other cases to like effect. It seems therefore that the usual personal liability of the trustees can be excluded by express provision brought home to every one dealt with; the *cestuis que trust,* are not partners if the ownership and control of the fund are left with the trustees; and by express provision brought home to a dealer the Trust Fund alone can be made liable for the obligations of the trust.

I have referred to the provisions relating to capital stock of a corporation, and pointed out some of the discordant theories in reference thereto. It has been, in the main, a struggle between persons on the one hand who have wished to capitalize visionary prospective profits before their dreams were in fact realized, and if disaster came, to get out from under, with some one else in possession of the hot air bag,[262] and the State's effort on the other hand to make the actual capital, in the beginning come up to the manifesto, or supplement this by other liabilities that frequently work unnecessary hardship upon honest business.[263] It certainly cannot be said that the schemes so far devised have been satisfactory. Upon the one hand they have been insufficient to accomplish their real purpose; and upon the other, have been too inflexible and inelastic to encourage honorable and legitimate enterprise. The careful investor in shares has difficulty to ascertain from statements of capital stock much that aids him in getting at real values, while the careless one is almost certain to be misled. The creditor also is in much the same predicament. The really careful investor or creditor, relies not upon the capital stock statements but upon the actual property and course of business of the particular institution.[264] The Trust for the most part proceeds upon a like theory. If one deals with a Trust in reference to the Trust, it is made his duty in the absence of express provisions otherwise, and if he has notice that he must look to the Trust property alone for security, to ascertain just what that property is, without regard to any amount of nominal shares that may be issued against it.[265] In other words the shares, few or many, have nothing particularly to do with the property, but are only the

[262] See dissenting opinion of Chief Justice Fuller in Handley v. Stutz (1891) 139 U. S. 417, 2 Wilgus, Cases, 1923, 1932.

[263] Machen, A. W., "Do Corporation laws allow sufficient freedom to commercial enterprise?" Maryland Bar Ass'n Report, 1909, pp. 78-98.

[264] See Cook, Corporations, 7th Ed. §§ 46-47.

[265] Kisch v. Tozier (1894) 143 N. Y. 390, 42 Am. St. R. 729, note 733.

method of indicating aliquot parts of the fund for the convenience of the owners. The investor and the creditor both are expected to act as business men do, and are required to do, when they are dealing with individuals, that is, rely upon their own investigation, knowledge and judgment.

Different people will take different views as to the best policy, in this regard.[266] Recently New York has provided for the issue of corporate shares without par value, and has recognized the duty of investor and creditor alike to rely upon his own judgment, instead of upon the uncertain meaning of a fixed capital stock.[267] The efficiency and validity of blue sky laws are yet "in nubibus," and make corporate capitalization still more intricate,—and cloudy.[268]

While the right of inspecting corporate books by shareholders is now generally recognized, without any actual controversy being involved, such right, in the case of Trusts, can be fully recognized or regulated by the trust deed provisions, as the stautory or common law rules permit in the case of corporations.

In an article in the *Atlantic Monthly*, a short time ago, Mr. F. L. STETSON, mentioned various disadvantages of corporations: There are, said he (1) Taxation,—organization tax, franchise or continuing tax, property tax, transfer tax, foreign state tax, and Federal tax, nearly all of which are now imposed upon corporations, and in addition thereto the shares of shareholders are frequently taxed to the owner, if not in the creating state, certainly to him when he lives in another state.[270] So, too, the franchise tax may be imposed at home, and another privilege tax in each of the states where the corporation does business, and these may be and frequently are higher than domestic corporations in the same business pay, for a corporation does business, other than interstate commerce, in a foreign state by sufferance, comity as it is called,—rather than by right.[271] Property of course is taxed wherever it is,

[266] See Burton, T. E., Corporations and the State (1911); Stock Watering, W. Z. Ripley, 26 Pol. Sci. Q. 98-121 (1911); Capital of Corporations, G. W. Wickercham, 22 Harv. Law Rev. 319-338 (1909); Overcapitalization, 38 Natl. Corp. Rep. 59 (1909); Stockwatering, 12 Bench and Bar, 43 (1908); Williams v. McClave (1914) 148 N. Y. S. 93.

[267] Shares Without Nominal or Par Value, Victor Morawetz, 26 Harv. Law Rev. 729 (1913).

[268] Blue Sky Laws, F. A. Updike, 7 Am. Pol. Sci. Rev. 230-237 (1913); Alabama & N. O. Transp. Co. et al. v. Doyle (1914) 210 Fed. 173.

[269] 110 Atl. Monthly, p. 27 et seq. (1912), July).

[270] 2 Wilgus, Cases, pp. 1370-1391; Farrington v. Tennessee (1877) 95 U. S. 679, 2 Wilgus, Cases, 1370.

[271] Bank of Augusta v. Earle (1839) 13 Pet. (38 U. S.) 519, 2 Wilgus, Cases, 1480; Manchester Fire Ins. Co. v. Herriott (1899) 91 Fed. 711, 2 Wilgus, Cases, 1498, note 1502.

but here the fiction that personal property follows the owner, is often applied much more rigorously to corporations than to individuals. Shares are also subject to an inheritance tax, in the state where the deceased lived, in the state where the corporation is incorporated, and according to some decisions also where the shares are to be transferred. The transfer tax can be imposed wherever the transfer is to be made.[272] The Federal tax is now an income tax, and of course would apply to the income of a Trust as well as a corporation. The Supreme Court however held that the income tax of 1909, applied only to such associations "as are organized under some statute, or derive from that source some quality or benefit not existing at the common law," and Trusts were not so organized and have no such quality.[273] In Massachusetts after much variety of opinion, the Supreme Judicial Court has finally ruled that these institutions can be subjected to an excise tax under their constitution, similar to corporations.[274] Trust property is usually taxed only to the trustee, who may indemnify himself out of the trust estate.

Mr. STETSON points out also (2) that corporations are not protected under the 4th and 5th amendments as natural persons are, with special reference to divulging incriminating information, discrimination against them, as to terms of doing business, and enforcing claims. So also under the reserved power to repeal or amend corporate charters, many limitations and restrictions upon a corporation's power to contract can be and are imposed that would not be valid if imposed upon citizens of the United States.[275] So a foreign corporation as a creditor, unless it has entered a state and complied with its laws in reference to doing business in the state, is not a person within the jurisdiction, so as to be protected under the

[272] Morrison v. Manchester (1879) 58 N. H. 538; Fowler v. Campbell 100 Mich. 398; City of Detroit v. Lewis, 109 Mich. 155, 32 L. R. A. 439; Mills v. Thornton, 26 Ill. 300, 79 Am. Dec. 377; Matzenbaugh v. People, 194 Ill. 108, 88 Am. St. R. 134; Latrobe v. Mayor, 19 Md. 13; Corry v. Baltimore, 96 Md. 310, 196 U. S. 466, 25 S. C. 297; Tappan v. Merchants' Bank, 19 Wall (U. S.) 490; Merriman's Estate, 147 Mich. 630; Estate of Palmer, 183 N. Y. 238; In re Ames Estate (1913) 141 N. Y. S. 793; People v. Union Trust Co., 255 Ill. 168; Matter of Cooley, 186 N. Y. 220.

[273] Eliot v. Freeman (1911) 220 U. S. 178.

[274] In re Opinion of Justices (1908) 195 Mass. 607, 84 N. E. 490; In re Opinion of Justices (1911) 208 Mass. 616, 94 N. E. 1043; Compare S. S. White Dental Mfg. Co. v. Commw. (1912) 212 Mass. 35, 98 N. E. 1056 (Corp.); Keystone Watch Co. v. Commw. (1912) 212 Mass. 50, 98 N. E. 1063 (Corp.); Farr Alpaca Co. v. Commw. (1912) 212 Mass. 156, 98 N. E. 1078 (Corp.); Baltic Min. Co. v. Commw. (1913) 231 U. S. 68, 34 S. C. 15.

[275] State v. Nashville etc. Ry. Co. (1911) 124 Tenn. 1, 135 S. W. 773, Ann. Cas. 1912 D. 805; Hale v. Henkel (1906) 201 U. S. 43; Wilson v. U. S. (1911) 221 U. S. 361; McGuire v. Railway Co. (1906) 131 Ia. 340.

clause that says "no state shall deny to any person within its jurisdiction the equal protection of the laws."[276] In almost all these particulars, trustees being citizens of the United States and entitled to all the privileges and immunities of citizens in the several states, would be protected more fully than a corporation.[277] So too many states attempt to exclude corporations doing business in the state from suing in the Federal courts, and while they cannot actually exclude them from the Federal Courts, they may oust the offending corporation from the state.[278]

Mr. STETSON also points out (3) the very great and unjust toll that is paid by corporations in litigation because of prejudice against them, exhibited by juries and legislators. In some degree at least this would be less pronounced in the case of a Trust, where responsible local citizens of standing were the trustees.

Upon the public side it was noted in the beginning that one of the crying weaknesses of corporations was the impersonal character, and the lack of individual personal responsibility, especially toward the public, that characterized it, and its actions. It might seem that here the Trust would be superior; and it is more than probable that so far as the relation of the Trustee toward the beneficiaries, is concerned, there is under the rules of courts of Equity, a much more positive and direct feeling of personal responsibility.

Toward the public, however, this may be doubted, for we have the experience that all of our great industrial combinations, good and bad, have almost without exception originated as Trusts, under Trust deeds such as we have been describing;[279] and from this form, held by the New York Court of Appeals, in the Sugar Trust[280] case to be illegal as a partnership contrary to the right of a corporation to be a member of such, and by the Supreme Court of Ohio in the Standard Oil Case to be an institution in unlawful restraint of trade,[281] those who then saw the handwriting on the wall fled in hope to find legal shelter in the corporate form, only to find their

[276] Blake v. McClung (1900) 176 U. S. 59, 2 Wilgus, Cases, 2045; (1898) 172 U. S. 239, 2 Wilgus, Cases, 2036.

[277] Farmers Loan & Trust Co. v. Chicago etc. Ry. Co. (1886) 27 Fed. 146; Roby v. Smith (1891) 131 Ind. 342, 20 N. E. 1093; Sears, Trust Estates etc., 194.

[278] Doyle v. Continental Ins. Co. (1876) 94 U. S. 535, 2 Wilgus, Cases, 1491; Harrison v. St. Louis & S. F. R. Co. (1914) — U. S. —, 34 S. C. 333.

[279] See 1 Wilgus, Cases, pp. 957-984. See cases in 212 Mass., and 231 U. S. in note 274 above.

[280] People v. North River Sugar Ref. Co. (1890) 121 N. Y. 582, 1 Wilgus, Cases, 100, note 109.

[281] State v. Standard Oil Co. (1892) 49 O. S. 137, 34 Am. St. R. 541.

hope in vain.[282] Neither trust nor corporate form where restraint of trade is the end of the organization, can stand the searching power of the government to destroy either under the common law or under the anti-trust acts.[283]

Massachusetts has through Commissioners made investigations of these Express Trusts, and after two reports, enacted legislation providing for the filing with the Railroad Commission of all deeds of trust for such Associations, and in the case of Trusts for owning shares in railway, street railway and electric railway companies, or which are managed by the same parties, making annual reports to, and making them subject to examination by, the Railroad Commission. The same power is given also to the Gas Commission in reference to gas, electric light, and power companies.

If the foregoing review is accurate, it would seem that, largely because of the variety, uncertainty, and confusion arising from conflicting legislative provisions, the Trust form of organization, at least upon the private side, is more simple, certain, consistent and yet flexible, and perhaps with even more satisfactory safeguards available both to the investor and the creditor, than is the corporation.

Upon the public side, however, so far as control is concerned, the State can reach an offending corporation more directly and positively, notwithstanding the Trust form of organization was abandoned for the corporate form, with the belief that in that way anti-trust laws could be evaded.

So far as any feeling of direct personal responsibility toward the public as a whole is concerned, there does not seem to be much difference. The psychology of the group mind seems to be inherently different from that of a single individual. It will seek and accomplish ends from which individuals will shrink. As the non-explosives, glycerine, nitric and sulphuric acids and saw-dust mixed, make the explosive dynamite, so does the combination of the intelligent, the stupid, the selfish and unselfish, the honest and the dishonest, into one group, give a resultant that when quiescent usually does much better than the worst, yet from hidden powers often does much worse than the worst.[286] Undoubtedly much could be done to make

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[282] Distilling & Cattle Feeding Co. v. People (1895) 156 Ill. 448, 1 Wilgus, Cases, 978.

[283] Northern Securities Co. v. U. S. (1903) 193 U. S. 200; Standard Oil Co. v. U. S. (1910) 221 U. S. 1; U. S. v. Am. Tobacco Co. (1910) 221 U. S. 106.

[284] See chapters 454, 509, and 596 of Public Acts of 1913.

[285] Distilling and Cattle Feeding Co. v. People (1895) 156 Ill. 448, 47 Am. St. R. 1 Wilgus, Cases, 978.

[286] LeBon, The Crowd, pp. 2-44.

our corporation laws, more simple, certain and flexible; and a properly worked out Federal incorporation law would help corporations with extensive business in many respects, and furnish a model for state legislation.

When laws are uncertain, or unduly hamper legitimate enterprise, bright minds will invent methods to accomplish unexpected ends. In the early years of our history, there was great prejudice against the incorporation of banks, and there were either no laws permitting it or if there were any, they were such as were difficult to comply with. The brilliant services of Alexander Hamilton, and of Aaron Burr were called in requisition to devise plans for the institution of banks in New York City. Hamilton drew up a masterly paper which with a few words changed—directors to trustees, shareholders to beneficiaries, and a few others, would still be a model form for a Trust for business purposes, such as we have been considering, and which was the constitution of the Merchants Bank for 20 years, until the legislature forbade banking in any but the corporation form. On the other hand Aaron Burr engineered a bill through the New York legislature to incorporate a company to supply the city of New York with water, and with authority to use its surplus capital "in any way not inconsistent with the laws and constitutions of the United States and New York." Under this charter, so it is stated, the Manhattan Bank has been carrying on business for 115 years.[288]

These perhaps are typical illustrations as to what lawyers are called upon to do, and the methods sometimes resorted to. The one statesman-like, constructive, and within the law. The other unstatesman-like, destructive, and if within the law at all, only so by taking advantage of its uncertainty, to thwart the expressed will of the people.

Perhaps these things can never be wholly overcome until men are made over. All production is the result of the combination of forces within man, with forces and things outside him, of persons and property. From the beginning of time some men in whom the sense of brotherhood was latent or unborn, have always classed other men as external things to be used or exploited as other property, and have considered it proper to take all that their strength, their wit or their cunning enabled them to take; others have believed that they should take no more from the common fund than they had contributed to it; still others that they should contribute to it all their ability and their skill would enable them to

[287] Hamilton's Works, vol. 7, pp. 838-844; Sears, Trust Estates, etc., p. 341.
[288] Century Magazine, May, 1899; Parton's Life of Burr, p. 238.

do, and take from it only what they needed. There is no doubt but that the trend of the ages has been practically from the first of these toward the second, and perhaps in the more recent years of the Christian era, there has been a trend ideally at least, if not much practically, toward the third. As one or the other of these ends are dominant so will the nature and the administration of the laws be. And so will the institutions founded upon them be. But none will be perfect until men are perfect.

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